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IN THE

Supreme Court of the United States

October Term, 1954

No. 209

KEITH M. BEATY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY BRIEF

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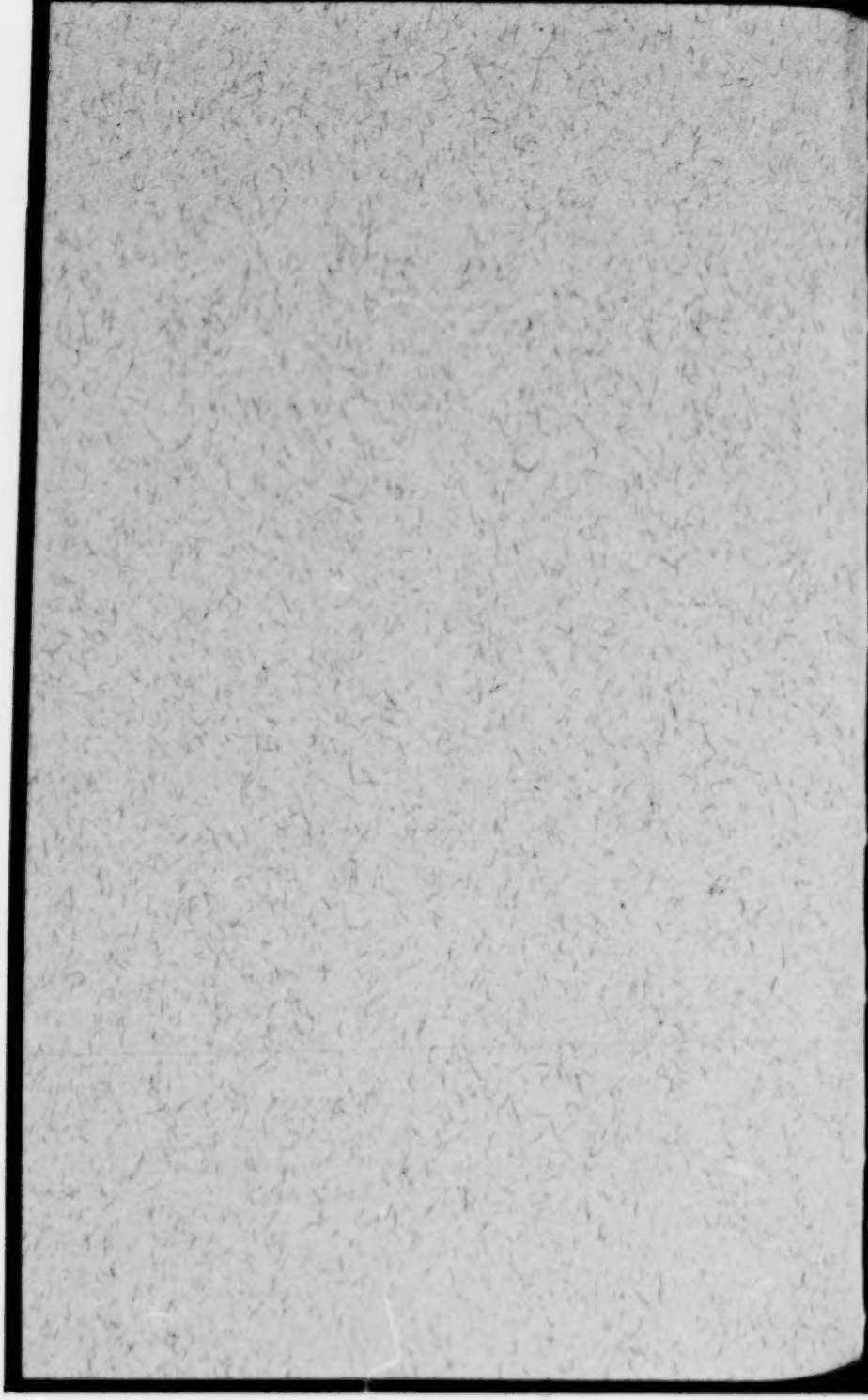

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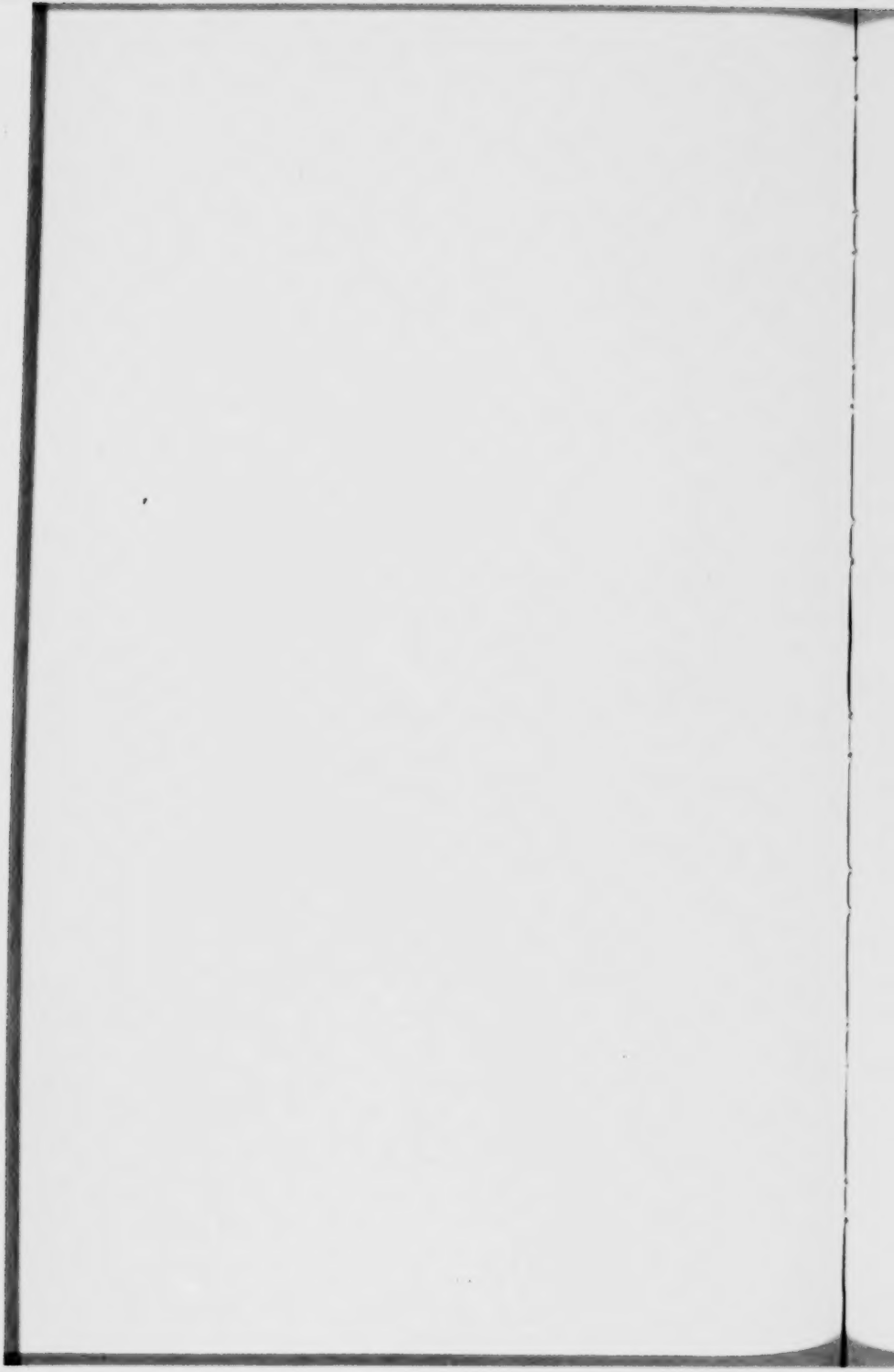

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PETITIONER'S REPLY BRIEF

In reply to the brief for the United States in opposition to certiorari, the petitioner respectfully presents the following for the consideration of the Court:

1.

Under Point 1 of brief in opposition to the petition herein, respondent states (Br. p. 11) that there was no objection by petitioner to the trial court's warning to the

jury which was as follows (Appendix to petition, p. 49, Minutes of Trial, pp. 53-54):

> "• • • *You know not but what you may be watched by some agency* that has in mind the prime purpose of seeing that a fair verdict is rendered in this case.
>
> • • • •
>
> "• • • *for I say to you that you might be watched, and if such should occur, then you, as a member of the jury, likewise would be amenable to punishment for having desecrated the oath of your office.*" (Emphasis ours.)

Respondent's counsel apparently inadvertently overlooked the fact that petitioner not only objected to the use of the above language by the Court, but did so in a most definite way (Minutes of Trial, p. 58 & 59), that is, at the first opportunity and before any other proceedings were had in the case, moved for a mistrial (Minutes of Trial, pp. 58-59). The objection was overruled by the trial court and the motion for a mistrial denied (Minutes of Trial, pp. 58-59). The motion for a mistrial states (Minutes of Trial, p. 58):

> "1. That the statement made by the Court to the jury with reference to jurors being contacted was highly prejudicial to the defendant.
>
> "2. That the facts elicited from the jury did not point to defendant contacting or attempting to contact the jury and statement made by the Court to the jury implied that the defendant or the defendant's friends had so done, which, in the opinion of the defendant is highly prejudicial to the defendant.
>
> "3. That the statement by the Court to the jury that the jury might be or could be or would be watched implied that the Government would watch these jurors, the only purpose being for the Government to watch the jurors was to keep the defendant or his associates from further contacting this juror, or attempting to so do.
>
> "4. That the whole context of the statement could do nothing but lead the jury to believe that the de-

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fendant had done something wrong, was guilty, and will greately influence their verdict."

Counsel for the respondent in commenting on *Remmer v. United States,* 347 U.S. 227, overlooked the main purport of that decision, that is, *"A juror must feel free to exercise its functions wi'hout the F.B.I. or anyone else looking over his shoulder".* We submit that where at the very outset of the trial, the trial court warns the jury that they cannot feel free to exercise their functions without the F.B.I. or someone looking over their shoulders and further actually threatens that it might be done, that the defendant cannot receive a fair trial under the holdings of the *Remmer* case, supra.

2.

The respondent attempts to minimize the importance in this case of computing income by the so-called expenditures method (Br. pp. 13-15), by stating in Respondent's Brief pages 11 and 12 that the issues raised by the group of "net worth" cases [1] now pending before this court are not raised by the record in this case.

Petitioner submits that there was no direct evidence placing in petitioner's hand any unreported income.

Respondent in its brief admits that the computations of its expert illustrated by charts prepared long before the trial only purported to show unreported income in the hands of the corporation (Respondent's Brief, p. 12). The only evidence showing additional income in the hands of the petitioner (according to the government's own expert's admission) was based on items of expenditures in excess of income (R. II, 152). This was circumstantial

[1] ***Friedberg v. United States,* No. 18; *United States v. Calderon,* No. 25; *Holland v. United States,* No. 37; *Smith v. United States,* No. 52.**

evidence which was rendered ineffective by the testimony of the Government witnesses themselves.

Witness Cline testified that he had not given petitioner any credit in his computations for cash on hand as of the beginning of the period, January 1, 1945 (R. I, 136).

Witness Parrish also testified that he had not given petitioner any credit for funds on hand at the beginning of the period (R. I 153-155).

The Government's own witnesses, bankers, testified that petitioner had on hand at the beginning of the period, January 1, 1945, approximately $100,000 (R. I 125). Seventy thousand dollars of this money was released to petitioner by the bank on March 20, 1945 (R. I 129).

Respondent in its brief states: (p. 12)

> "The backbone of the Government's case was the testimony of the taxi drivers and the semi-monthly reports submitted to the City of Charlotte by petitioner showing the number of cabs and the names of the drivers operating in the corporations rental and bonding system. Upon the basis of this direct evidence Agent Parrish submitted a computation, illustrated by charts, showing the amounts of unreported rental and bonding fees received by the corporation."

The reports referred to by respondent were furnished pursuant to a City Ordinance (R. I 351):

> "Such person, firm or corporation desiring to make a cash deposit for other persons shall adopt the trade name to be printed on each of said taxicabs before operation and furnish a list each fifteen days or whenever a change occurs to the Chief of Police and the City Treasurer, giving the name of the owner of the car to be bonded, the make and model of the car, the motor number, the State license number, and the driver of each car on the side of each said car shall be printed under the trade adopted these words

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> 'Bonded by (insert name here)' under Charlotte Taxicab Ordinance. Such list so required and furnished shall be for information only and shall determine the total bond sum to be deposited as provided above."

The Government witness, Cleveland, a taxicab inspector for the City of Charlotte, North Carolina, testified that these reports did not show that the cars reported were in actual operation but only that certain cars were licensed to operate (Minutes of Trial, p. 143), that they were frequently wrecked and sometimes stolen (Minutes of Trial, p. 144). And when your petitioner sought to ascertain by cross examination of the respondent's expert witness, Parrish, just how thorough a research job had been done by him, the trial court would stop petitioner (R. I, 315). We quote the court:

> "THE COURT: An expert only knows what he knows. He does not know what he ought to know. Mr. Muskoff, nobody has the foresight of God Almighty. All in the world this man could know would be the papers he examined, and he is only responsible for that. If it should be shown by something he knows that he is in error, of course the Government is bound by that.
> "MR. MUSKOFF: Are we bound only to show what he knows?
> "(R. 1777) THE COURT: How could he testify to that unless he knows and tell the truth?"

Thus the court will note that the defendant or petitioner was prohibited from ascertaining the correctness or credibility of the materials underlying the expert's testimony.

Therefore, we submit that neither the testimony nor the charts prepared a long time prior to the trial come within the ruling of this Court in the case of

United States v. *Johnson* 319 U.S. 503, 519.

In that case, the defendant was given full right to question the expert's computations. We quote from Mr. Justice Frankfurter's opinion:

"No issue was withdrawn from the jury. *The correctness or credibility of no materials underlying the expert's answers was even remotely* foreclosed by the expert's testimony or withdrawn from proper independent determination by the jury." (Emphasis supplied.)

3.

Under Point 3 of respondent's brief in opposition (Br. p. 16, 17), respondent admits that petitioner was required to file his income tax returns at Greensboro, North Carolina, which is located in the Middle District of North Carolina (Br. p. 16). It is not disputed that he was indicted in the Western District of North Carolina (Br. p. 16). But most important, respondent does not dispute *that the alleged crime of filing a false and fraudulent return was committed at Greensboro, North Carolina, in the office* of the Collector of Internal Revenue.

The indictment (R. 2, 3 and 4, Col. I) charges that the crime was committed on the respective dates of March 14, 1946, March 15, 1947 and March 14, 1948. It is significant that these were the dates upon which the returns were filed. Under the indictment, if any crimes were committed, they were committed on the respective dates of March 14, 1946, March 15, 1947 and March 14, 1948 when the alleged false and fraudulent returns were filed in the Middle District. The maintaining of false books and records and the concealment of assets, as also alleged in the indictment, were *pure evidentiary matters* serving, if anything, *only* to *prove* the alleged *intentionally false character of the return filed.*

In *United States v. Wilbur I. Clark,* United States District Court, Southern District of California, Central Division, Docket No. 23067 (as yet unreported but may be found at Paragraph 72,719, Volume 4, Prentice-Hall 1954 Tax Service) Chief Judge Yankwich recently (August 4, 1954) and incisively observed that concealment of income

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or assets and maintaining false books were the mere "indicia" or "badge of fraud", thus plainly removing such acts as indictable crimes and treating them in their proper category as proof or evidence of crime. Clearly, the jurisdiction of a Federal District Court cannot be bottomed on the locale of the evidence or proof of the crime. Moreover, such acts, (even if true) were performed not on the dates in March when the returns were filed, but long before that time. It is inescapable that the indictment charged the offenses as being committed *when* the returns were filed, thus plainly demonstrating that the indictment itself does not purport to include the alleged acts of concealment and false books as separate offenses upon which jurisdiction might rest. It is therefore, equally inescapable that the only offense charged (the acts of alleged concealment or false records only constituting proof) is that of filing a false return and that act was committed *where* the return was filed, in the Middle District of North Carolina.

Spies v. United States, 317 U.S. 492, heavily relied on by the respondent (Br. p. 17) and by the Court below to uphold the jurisdiction of the District Court for the Western District of North Carolina, did not involve the filing of a false and fraudulent return. That case covered a situation where no return at all was filed. The Petitioner's alleged false return to the Collector is the heart and core of the alleged offense in this case. It is the only crime committed, if any, complete and in itself. It is respectfully urged that the language of the *Spies* case should be generally construed in its application to those situations where non-filing is accompanied by affirmative acts. Conversely, it is respectfully urged that *Spies* is not properly interpreted as applying to a situation where, as here, the indictment charges that the offense committed was the filing of a false return together with other alleged affirmative acts serving only to prove the falsity of the return filed. Otherwise stated, the *Spies*

case has application to and clarifies what is a felonious "nonfiling", but has no import in those cases where "filing" has occurred and the additional acts complained of are not separate and indictable crimes, but merely evidential that a duly filed return is intentionally fraudulent, and that by such fraudulent filing an "attempt" to evade tax has been made.

Certainly, no court would ever permit a conviction under 145(b) as a completed attempt to evade tax where there was a concealing of assets, a concealment of sources of income or a keeping of false accounts *if a taxpayer made a true return of his income to the Sovereign.* Equally certain it is that no court would likely fail to find a violation of Section 145(b) if competent proof is made of concealment of income, assets or other devious conduct, when *the return* of the taxpayer *failed to include such concealed income therein.* In both cases, however, the wilful filing is the crime and no greater illegality accrues to it by a showing that preparation for its commission was made.

Respondent relies on *United States v. Johnson,* 323 U.S. 273 (Br. p. 17) to support the contention that a law should be construed to permit trial of a defendant in his vicinity, if possible. This court in that case observed that "Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure, they raise deep issues of public policy in the light of which legislation must be construed." A defendant is, as a matter of Constitutional right, Amendment VI to the Constitution of the United States required to be indicted and tried in the District where the alleged crime is committed. This is no question of convenience or formality. Jurisdiction here is the matter of Constitutional fundamental.

The respondent overlooks one of the essential arguments in the petition, i.e., that there is a diversity of opinion amongst the courts as to what court has jurisdiction of cases arising under Section 145(b) of the Internal

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Revenue Code. This is further emphasized by the recent decision of Judge Chestnut, United States District Court of Maryland, in *United States v. Emmitt R. Warring,* 121 F. Supp. 546, where the question of whether or not the defendant had a right to transfer his case from Maryland, where he was indicted, to the District of Columbia, where he lived and actually prepared and filed with the Deputy Collector's office at Washington, D. C. his income tax return for the year in question. Judge Chestnut, in overruling the motion to transfer, stated as follows:

• • • •

"• • • It is also true that the problem here as to the proper venue is an unusual one arising under the applicable federal statutes. As has been noted, distinction must be made between the judicial district and the collection district. As there are only about 65 collection districts but a much larger number (nearly 100) judicial districts, it seems that possibly one-third of the income taxpayers in Continental United States are required to file their returns with the Collector whose office is in a judicial district outside of the place of their residence in the collection district. United States v. Beard, D.C. Md. (1954) 118 F. Supp. 297. So far as I know it has been the uniform policy and practice of the Department of Justice to prosecute cases like the instant case, arising in other collection districts, by indictment found in the judicial district where the Collector's office is situated although the taxpayer is resident outside of that judicial district but within the area of the prescribed collection district. See also American Bar Association, Section of Taxation, Report of Committee on Procedure in Fraud Cases, 1953, at pp. 111, 112."

• • • •

We again submit that this is a question that should be settled by this Honorable Court.

4.

Respondent, under Point 5 of its brief, states: (Br. pp. 20-21):

> "It is also urged that the court should not have promised to follow the jury's recommendation. But petitioner, instead of objecting to the court's statement, remained silent on the subject just as long as it appeared that he stood to reap some benefit therefrom. He did not object when the statement was made; he did not object when the verdict was returned; he did not raise the point in the motion for a new trial; and he readily cooperated in the physical examination. * * *"

Counsel for respondent apparently overlooked the fact that this question was raised by petitioner in his motion for a new trial (R. I 537-543).

As ground No. 8 in his motion for a new trial petitioner stated (R. I 538):

> "8. The court erred in conferring with one of the jurors about the case in the absence of the other 11 jurors."

As ground No. 29 in his motion for a new trial, petitioner stated (R. I 542):

> "29. The verdict was not the free verdict of the jury, but was arrived at only after a trade or bargaining."

The motion was timely filed on December 22, 1953 (R. I 543) and was argued before the trial court (R. I 543) on January 20, 1954, (Minutes of Trial—p. 2391).

Respondent then proceeds to rely on Rule 30 of the Federal Rules of Criminal Procedure in its attempt to deprive the defendant of the right to raise this serious point and respondent in construing Rule 30 apparently overlooks the fact Rule 30 provides that no party may

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assign as error any portion of a charge or omission unless he objects thereto before the jury retires to consider its verdict. In this case, the jury had already retired and there was no opportunity to object to the additional promise or charge to the jury before they retired. Thus we submit that the case comes within the purview of the "plain error" rule. We submit that the action of the trial court so contrary to the well established principle that private communications, even though harmless in themselves, may open the way to abuses and may destroy confidence in legal procedure.

Fillippon v. Albion Vein Slate Co. 250 U.S. 76, 81

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary. that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction. See *Stewart v. Wyoming Ranche Co.*, 128 U.S. 383, 390; *Aerheart v. St. Louis, I.M. & S. Ry. Co.* 99 Fed. Rep. 907, 910; *Yates v. Whyel Coke Co.*, 221 Fed. Rep. 603, 608, and many decisions of

the state courts collated in 17 L.R.A., N.S. 609, note to *State of North Dakota v. Murphy,* 17 N. Dak. 48. "The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred—the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it—no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.

"It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States v. Un. S. Fidelity Co.,* 236 U.S. 512, 529; *Guerini Stone Co. v. Carlin Construction Co.* 248 U.S. 334, 348.

"And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

We submit that the trial court here improperly, and in order to induce a verdict, communicated with the foreman, in the absence of the other eleven jurors, and agreed to abide by any recommendation for mercy the jury would make. What did this foreman who was interested enough to attempt to hold private conversations with the trial court (R. I, 534), tell the rest of the jury? No one knows

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and as heretofore pointed out, when such an event occurs in the trial of a case, it is presumed to be injurious. *Fillippon v. Albion Vein Slate Co.*, supra.

This same question was presented to the 9th Circuit Court of Appeals and the court definitely held that reversal is required.

> *Ah Fook Chang v. United States* 91 F. (2d) 805, 810
>
> "The instant case is not one where the whole jury was instructed directly by the court either orally, or in writing. By instructing one juror to instruct the rest of the jury, the instruction was in fact given to the jury in the absence of appellants, their counsel and out of court, for the juror relaying the instruction would necessarily have done so in the jury room. On that theory reversal is required. Shields v. United States, supra.[2] Further, we have the case where no one knows what the juror told the rest of the jury. If he repeated correctly the judge's instruction, the error would not be prejudicial. If he did not, the error may have been prejudicial. Little v. United States (C.C.A. 10), supra. The jury received an instruction second hand, and not by the judge. Chances for error are too great. Presuming the error to be prejudicial, the rule in Fillippon v. Albion Vein Slate Co., supra, is applicable and requires reversal."

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[2] *Shields v. United States*, 273 U.S. 583, 47 S. Ct. 478, 71 L.Ed. 787.

CONCLUSION

Petitioner respectfully submits that this Honorable Court should grant the petition for certiorari.

Respectfully submitted,

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